

**BEFORE THE COMMISSION ON COMMON OWNERSHIP COMMUNITIES
MONTGOMERY COUNTY, MARYLAND**

Tattersall Woods Homeowners Association, Inc.,	:	
	:	
Complainant	:	
	:	
vs.	:	Case No. 458-G
	:	(Hearing Date: May 31, 2000)
Channa Perera & Amanda Perera	:	
	:	
Respondents	:	

DECISION AND ORDER

The above entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, as amended, for a hearing on May 31, 2000, and the Commission having considered the testimony and evidence of record, it is this 13th day of July, 2000, found, concluded, and ordered as follows:

FINDINGS OF FACT

1. Complainant Tattersall Woods Homeowners Association, Inc. (the "Association") is a homeowners association located in Montgomery County, Maryland. Tattersall Woods consists of 46 single family detached dwelling units on lots of approximately 20,000 square feet, more or less.

2. Channa Perera & Amanda Perera (the "Pereras") are the record owners of 9845 Mainsail Drive, Gaithersburg, Maryland 20879, a property which is located within Tattersall Woods and subject to its governing documents.

3. The property located within Tattersall Woods is subject to a Declaration of Covenants, Conditions and Restrictions recorded at Liber 6802, folio 420 among the Land Records of Montgomery County, Maryland. Article V of the Declaration of Covenants, Architectural Control, provides:

"No building, fence, wall or other structure shall be commenced, erected or maintained upon the Property, nor shall any exterior addition to or change or alteration therein be made (including change in color) until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of

Directors of the Association, or by an architectural committee composed of three (3) or more representatives appointed by the Board. In the event said Board, or its designated committee, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with. Notwithstanding any provision of this Declaration to the contrary, the provisions of this Article V shall not be applicable to the Declarant or any part of the Property owned by the Declarant."

4. Without first receiving approval in writing, the Pereras constructed a fence and a rabbit hutch on their property.

5. The Pereras applied for approval of the fence on two occasions before it was constructed. On both occasions the Association denied their application. Nevertheless, on approximately August 13, 1999 they constructed a split rail fence on their property without written approval.

6. The Pereras erected a rabbit hutch on their property in August, 1999, without first applying for written approval. In February 2000 they submitted an application for approval of the rabbit hutch and the Association approved it with conditions.

7. The Association tentatively approved the rabbit hutch and stipulated at the hearing on May 31, 2000 that the rabbit hutch would still be subject to final approval under the following conditions:

a. The dimensions of the rabbit hutch must remain as they presently are.

b. The rabbit hutch must be painted in a color to harmonize with the color of the Pereras' dwelling.

c. As provided in the Tattersall Declaration of Covenants, Article VII, Section 6, the Pereras may not breed the rabbits.

8. The Association's position is that in its 14-15 year existence it has not approved fences constructed at the front building line of dwellings on both sides of the dwelling. Fences may be constructed at the front building line only on one side of a dwelling, the garage side. Fences on the side of the dwelling opposite the garage side may be constructed only as far forward as 8 feet in front of the rear building line, depending on the circumstances of the property. No fence may be constructed and no fence has been approved in front of the front building line.

9. For example, at 9900 Mainsail Drive, there is a fence constructed at the front building line on the garage side of the dwelling and 8 feet in front of the rear building line on the opposite side of the dwelling. The reason that the fence opposite the garage side is constructed 8 feet in front of the rear building line is due to requirements of the Montgomery County Code for fencing around swimming pools. 9900 Mainsail Drive has a swimming pool in the rear yard.

10. The evidence of record established that no dwelling in Tattersall has a fence constructed at the front building line on both sides of the dwelling.

11. William B. Mullet, current chairman of the Architectural Control Committee for Tattersall Woods, and a member of the committee for approximately 14 years, testified that due to the topography of the Perera property, the fence on the side of the Perera dwelling opposite the garage would probably be approved in a location as far forward as 8 feet from the rear building line.

12. In addition to their arguments that denial of the location of their fence at the front building line on the side of the dwelling opposite the garage is unreasonable, the Pereras also raised the following issues:

a. Tattersall Woods does not have a specific rule or regulation setting forth in detail the accepted location for fences.

b. Tattersall Woods has failed to conduct regular annual membership meetings and regular Board of Directors meetings as required in its By-laws. Article III, Section 1 of the Tattersall Woods By-laws calls for an annual meeting of the members to be held on the same day of the same month each year unless that day falls on a legal holiday. Article IV, Section 1 of the Tattersall Woods By-laws requires the Board of Directors to meet at least two times during each fiscal year.

c. The Board of Directors has not properly appointed members to the Architectural Control Committee. Article X of the Tattersall Woods By-laws states that the Association shall appoint an Architectural Control Committee as provided in the Declaration. Article V of the Declaration calls for the Board of Directors to sit as an Architectural Control Committee or to appoint an Architectural Control Committee composed of three or more members.

d. There have been a number of changes or alterations to dwellings in Tattersall Woods which may or may not have been approved by the Architectural Control Committee, including addition of a light house style structure in the front yard of one of the dwellings; addition of an elaborately ornamented storm door; addition of a weather vane on top of the garage of a dwelling;

addition of a tool shed in the rear yard of a dwelling; and addition of a hot tub structure in the rear yard of a dwelling.

13. Representatives of Tattersall Woods testified that members of the Board of Directors serve until their successors are appointed in the event that an annual election does not take place due to lack of a quorum or for other reasons.

14. Representatives of Tattersall Woods testified that the composition of the Architectural Control Committee was originally established by the Board of Directors. The Architectural Control Committee does not fall below three members. When the Architectural Control Committee membership falls to three or close to three, new members are enlisted and their names are presented to the Board of Directors at the next Board of Directors meeting after the new members have been added to the Architectural Control Committee. There was no testimony that the Board of Directors has ever rejected a new member to the Architectural Control Committee added in this manner.

15. The Association requested an award of attorney's fees in the event that it is successful in this appeal based upon paragraph 3 of its application form for approval of changes or modification. Paragraph 3 states:

Any construction or exterior alteration before approval of this application is not allowed; that if alterations are made, I may be required to return the property to its former condition at my own expense; and, that I may be required to pay all legal expenses incurred.

16. The amount of attorney's fees expended to the date of the hearing was \$2,135.96. The hearing lasted approximately 4 1/2 hours, and the hourly rate for Tattersall Woods' attorney is \$150.00.

CONCLUSIONS OF LAW

The Panel reaches the following conclusions of law.

1. The rabbit hutch constructed by Respondents is a structure which requires submission of plans and specifications and approval in writing prior to construction. Respondents failed to follow Article V of the Declaration of Covenants in this regard in that they constructed the rabbit hutch without first submitting plans and specifications and obtaining written approval.

2. Since it was first created, Tattersall Woods has consistently, and over a long period of time, at least 14 years, not approved the location of fences at the front building line of a dwelling on both sides of the dwelling. It has approved fences located in front of the rear building line, but not in front of the

front building line, only on one side of a dwelling, usually the garage side. The Association has approved fences located as much as 8 feet in front of the rear building line of dwellings on properties depending upon the individual circumstances of the property, such as the situation at 9900 Mainsail Drive, where the fence was required by County regulations because of the swimming pool in the rear yard.

3. The Pereras have not demonstrated a waiver or abandonment of the above longstanding interpretation/policy of Tattersall Woods regarding the location of fences and the panel concludes that the Association's interpretation/policy is reasonable.

4. The Court of Appeals of Maryland in Kirkley v. Seipelt, 212 Md. 127, 128 A.2d 430 held that even though a covenant may lack specific standards to guide the approving party in determining whether to approve or disapprove applications for architectural change, the covenant will be upheld and decisions will be upheld provided that the refusal to approve an application for a change or modification is

...based upon a reason that bears some relation to the other buildings or the general plan of development; and this refusal will have to be a reasonable determination made in good faith, and not high handed, whimsical, or captious in manner.

5. The Pereras' fence is in violation of the Declaration of Covenants of Tattersall Woods in that it is located at the front, building line of Respondents' dwelling on both sides of the dwelling.

6. The Association has stipulated that it would approve the rabbit hutch if the conditions in Finding of Fact No. 7 above are met. This position is reasonable.

7. Pursuant to Section 10B-13(d), this panel may award costs or attorney's fees if the Association documents so require and the award is reasonable under the circumstances. Because the Pereras knowingly signed the application form on at least three occasions agreeing to the award of attorney's fees in the event that they might be required to return their property to its former condition at their own expense, including the payment of all legal expenses incurred, the panel concludes that this provision of the application forms a specific basis for an award of attorney's fees. However, the award of attorney's fees is discretionary and the panel declines to award attorney's fees against the Pereras in this case.

8. The Association has been lax in following the procedures of its documents, particularly with regard to the election of directors and the appointment of members of the Architectural

Control Committee. While the panel does not find that the decisions of the Association and its Architectural Control Committee are not legally binding, it does recommend that relevant procedures be examined and observed more carefully in the future.

9. Although the Kirkley case affords a legal basis for the Association's decision in this case, even in the absence of specific standards, the panel also recommends that the Association establish specific guidelines with regard to the placement of fences to avoid any confusion in the future on the part of its members.

10. With respect to the allegedly casual manner in which the Association is claimed to have operated, the panel finds that the failure to conduct regular membership and Board meetings has not been shown to invalidate the actions of the Association. Directors serve until their successors are elected and it was not shown that there has not been a continuity of service by directors on the Board of Directors, or that the Board of Directors has failed to conduct the business of the Association. The appointments to the Architectural Control Committee have been at least tacitly approved by the Board of Directors.

11. The changes and modifications shown by the Pereras, other than fences, are not relevant to whether there has been a waiver or abandonment of the policy with respect to fences. The fact that different styles of storm door or other architectural features may be allowed without restriction or approval, does not lead to the result that the restrictions on location of fences, which have been strictly adhered to, have been waived or abandoned.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is this 13th day of July, 2000 ordered


1. Respondents shall either remove the rabbit hutch completely or implement the modifications set forth in Finding of Fact No. 7 above within thirty (30) days from the date of this order.

2. Respondents shall remove the portion of their fence located on the side of their dwelling opposite their garage and, if they choose they may relocate that fence in a position on their property not more than 8 feet in front of the rear building line of the dwelling on the side of the dwelling opposite the garage within thirty (30) days from the date of this order.

3. The Association shall approve Respondents' fence as relocated in accordance with this decision.

4. Any party aggrieved by the action of this Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure.

The decision of the Panel is unanimous.



John F. McCabe, Jr., Panel Chair
Commission on Common Ownership
Communities